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Supreme Court of the United States

October 1965 Term

No. 866

NECCHI SEWING MACHINE SALES CORP.,
Petitioner,

against

NECCHI S.P.A.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Judge and the Associate Justices of the Supreme Court of the United States:

Necchi Sewing Machine Sales Corp. (hereinafter referred to as "Sales") petitions for a writ of certiorari to review an order made in these consolidated appeals by the Court of Appeals for the Second Circuit under date July 15, 1965 (*infra*, Supp. p. 26).

Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

Proceedings Below

By order dated September 10, 1964, endorsed on the papers and not otherwise reported, United States District Court Judge Sylvester J. Ryan (1) granted a motion made by Sales to require respondent Necchi S.p.A. (hereinafter referred to as "Necchi"), to appoint an arbitrator and proceed to arbitration pursuant to the provisions of a written contract between the parties dated July 18, 1961, as extended by a writing dated January 18, 1962, and (2) granted Sales' motion to dismiss a declaratory judgment action brought by Necchi for the determination of the arbitrability of the items contained in Sales' Demand for Arbitration and (3) denied Necchi's cross-motion to stay arbitration proceedings until the issues raised in its declaratory judgment action were determined either in that action or in Sales' proceeding to compel arbitration.

Appended hereto are copies of:

1. Exhibit A: The agreement of July 18, 1961 (*infra*, Supp. pp. 1-10)*;
2. Exhibit B: The extension agreement of January 18, 1962 (*infra*, Supp. pp. 11-18);
3. Exhibit C: Sales' Demand for Arbitration (*infra*, Supp. pp. 19-21);

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* Unless otherwise indicated by the context, numerals in parentheses when preceded by "Supp." will refer to the supplementary pages to this brief, containing the Exhibits hereto annexed, and when preceded by "App." will refer to the Appendix to Sales' brief in the court below.

4. Exhibit D: Judge Ryan's Opinion and Order (*infra*, Supp. pp. 22-23); and

5. Exhibit E: Sections 4 and 5 of the Federal Arbitration Act (*infra*, Supp. pp. 24-25).

On Necchi's appeal from Judge Ryan's order, the Court of Appeals for the Second Circuit (Chief Judge Lumbard and Judges Moore and Marshall), in a unanimous opinion written by Judge Marshall (Exhibit F, *infra*, Supp. pp. 26-34) and reported in 348 Fed. 2nd 693, affirmed in part and reversed in part Judge Ryan's order that Necchi proceed to arbitration, and affirmed Judge Ryan's dismissal of Necchi's declaratory judgment action without prejudice.

Sales' motion for rehearing was denied by the Court of Appeals by an order dated July 15, 1965 (Exhibit G, *infra*, Supp. p. 35).

The time for the submission of this Petition was extended to January 5, 1966 by order of Mr. Justice Harlan, dated November 19, 1965 (Exhibit H, *infra*, Supp. p. 36).

The Questions Presented

The questions presented are:

1. Where parties of diverse states are in dispute as to the interpretation of the scope of the arbitration clause in a contract between them for transactions in interstate commerce, and State law would apply to the interpretation of all other provisions of the contract, should the Federal court interpret the arbitration clause according to federal law, or should it apply the contrary rule which obtains in the state court.

2. Where the District Court did not consider or decide whether or not the disputes referred to in a Demand for Arbitration came within the ambit of the arbitration provision, that court being of the opinion that, as required by State law, the question was to be determined by the arbitrators, was it proper for the Court of Appeals, it being of the opinion that federal law made the question one for the court, itself to decide the question, even though it found the record "meager", or should that Court have remanded the matter to the District Court to get the background facts and circumstances and determine, in the light thereof, whether or not the parties intended that any dispute with respect to the interpretation of the arbitration clause should be resolved by the arbitrators.

3. Even if the question of arbitrability were for the court, and even if it were proper for the Court of Appeals to decide it, was it proper for that Court to hold that certain of the Demands, including the basic and most important one, though it was within the scope of the arbitration clause, was not arbitrable because it presented questions which a court would not undertake to decide.

Statement of the Case

Necchi, an Italian corporation, is a manufacturer of sewing machines. Since 1948, when Necchi's product commenced being sold in this country (App. 7b), Sales, a New York corporation, has been Necchi's "Exclusive Distributor" (App. 7b) in the United States.

Between 1948 and the end of 1963, Sales bought about 700,000 machines from Necchi, for which Sales paid Necchi

approximately $40,000,000.00. This result was accomplished by Sales' efforts and business acumen, by its creation of a net work of some 2,000 distributors and dealers across the country, and by its expenditure of approximately $10,000,000.00 in advertising and promoting the Necchi machine (App. 7b-8b).

Under date of July 18, 1961, the parties entered into one of the agreements here involved, by which they continued Sales' "Exclusive Distributorship" until December 31, 1962 (Exhibit A, Par. 1, *infra*, Supp. p. 1 and Pars. 3a, d, h, *infra*, Supp. pp. 2, 3, 5).

The aforesaid Agreement, though in the form of a letter by Sales to the President of Necchi, "confirming" previous conversations between the parties in Pavia, Italy, "concerning the terms and conditions that are to govern the business relationship" between the parties (Exhibit A, opening paragraph, *infra*, Supp. p. 1), was obviously prepared by Necchi's attorneys: it is on their stationery (Supp. pp. 2, 4, 6, 8).

Paragraph 3i of this Agreement reads (Exhibit A, *infra*, Supp. p. 5):

> "Six (6) months before the expiration of this agreement, that is, before June 30, 1962, Necchisew* and Necchi S.P.A. of Pavia, shall examine the possibility of executing a new and, it is hoped, long term distributorship agreement for the same territory and at such terms and conditions as will be then discussed and defined."

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* This is the name by which Sales is referred to in the Agreement (Exhibit A, *infra*, Supp. p. 1).

Paragraph 3m of this Agreement reads (Exhibit A, *infra*, Supp. pp. 7, 8):

> "All matters, disputes or disagreements arising out of or in connection with this Agreement shall be finally settled by three (3) Arbitrators appointed as follows: * * * The Arbitrators shall decide the issues(s) *ex bono et aequo* and their award shall not be subject to appeal."

The provisions of the July 18, 1961 Agreement were extended for one (1) year by an Agreement dated January 18, 1962 (Exhibit B, Par. 1, *infra*, Supp. p. 12, and Par. 6, *infra*, Supp. p. 18).

This Extension Agreement was prepared by Necchi: it is contained in a letter on Necchi's stationery, signed by it in Pavia, Italy, and sent by it to Sales for the latter's "acceptance" here (Exhibit B, *infra*, Supp. pp. 11, 18; App. 9b).

This Agreement provided (Par. 2, *infra*, Supp. pp. 12-13):

> "The meeting between the Parties—which should have taken place within June 30, 1962, as foreseen by paragraph (i) for the examination of the extension or for the negotiation of new agreements—is similarly extended for one (1) year and will have to take place within June 30, 1963."

It is undenied that Necchi deliberately and persistently ignored Sales' importunities for a negotiation respecting an extension of the existing Agreement or a new one, as provided in the aforesaid paragraph 2 of the January 8, 1962 Agreement. Instead, on Necchi's assertion that it

wished to investigate business conditions in this country before engaging in such negotiations—which subsequent events proved was merely a subterfuge—Necchi procured from Sales, and Sales gave Necchi, in confidence, the names and addresses of, and other information concerning, Sales distributors in various parts of this country. Indeed, Sales went further: it offered to send one of its representatives along with Necchi's representative, to assist him, but he declined the offer, saying he preferred to go alone. Sales notified its distributors that Necchi's representative would call on them, and urged them to assist and cooperate with him when he did (App. 9b-12b).

Necchi's representative called on Sales' distributors and, although Sales exclusive distributorship Agreement was still in effect, he, unbeknown to Sales, not only entered into new Agreements directly with Sales' distributors for the sale to them of Necchi machines, but at prices less than Sales would be able to quote them, particularly in view of Necchi's simultaneous increase of about 20% in its prices to Sales—the largest increase imposed by Necchi on its distributors in any part of the world, despite the severe competition which had developed here because of the cheap machines coming in from Japan (App. 10b).

Notwithstanding all its efforts, Sales has never been able to persuade Necchi to carry out its agreement to negotiate with reference to the extension of the existing distributorship agreement or for the making of a new one and, in consequence, no such negotiation has ever taken place (App. 10b-11b).

In these circumstances, Sales served its Demand for Arbitration of nine (9) specified items of dispute (Exhibit C, *infra*, Supp. pp. 19-21). The basis for federal jurisdiction in the District Court was U. S. C. Section 1332 (a)(1). Necchi countered with an action for a declaratory judgment that the disputes were not arbitrable, and moved for a stay of arbitration until the questions raised by it were decided.

The Opinion of the District Court

The learned District Judge, after quoting the arbitration clause involved, and Sales' Demand for Arbitration, granted Sales' motion to direct Necchi to proceed with arbitration, saying (Exhibit D, *infra*, Supp. p. 23):

> "Whether or not these matters 'arise out of' or are 'in connection with' the agreement of July 18, 1961, we do not now finally determine; nor is it necessary for us to do so. The broad scope of the arbitration provision precludes us from preliminary inquiry as to whether the nine (9) listed items arise 'out of or in connection with the agreement' (Matter of Exercycle Corp., 9 N. Y. 2d, 335)."

The Opinion of the Court of Appeals

The learned Court of Appeals held (Exhibit F, *infra*, Supp. pp. 26-34), that despite the federal policy in favor of arbitration and "the ostensible broad reach of the arbitration provision" here involved, the question was not for the arbitrators unless the arbitration provision was broad

enough to vest this power in them, and (Exhibit F, *infra*, Supp. p. 29)

> "The arbitration provision here is broad, but not that broad."

Having held that the District Court failed to fulfill its duty to determine whether or not the items listed in the Demand for Arbitration were matters, disputes, or disagreements "arising out of or in connection with" the 1961 Agreement, the learned Court of Appeals said (*infra*, Supp. p. 30) that the question of arbitrability "seems so clear" that it would not remand to the District Court, but would make the determination itself "even on the meager record before us."

The learned Court of Appeals then held that "Items 4 and 5 are arbitrable" (*infra*, Supp. p. 31) and that the others are not (*infra*, Supp. pp. 31-34).

As to Items 1 and 2, which presented Sales' claim for damages and an accounting by Necchi for its dealings with Sales' distributors, the Court held (*infra*, Supp. pp. 31-2) that

> "there is no plausible claim that any of these practices contravened the agreement, or that Necchi's conduct in these affairs was governed by the agreement."

We respectfully submit that that view was erroneous: Necchi's direct dealings with Sales' distributors was a violation not only of its contractual duty, but of its common law duty, as well, not to compete with its "exclusive distributor" (see *infra*, pp. 27-9).

With respect to Item 8—Necchi's failure to carry out its agreement to negotiate about the granting of an extension of the distributorship agreement or the making of a new one—the learned Court of Appeals said (*infra,* Supp. p. 33):

> "We also hold that, in the light of the circumstances of this case and the language of the 1961 agreement, item 8 is not arbitrable."

The reasons for this conclusion, said the Court of Appeals, were (*infra,* Supp. pp. 33-34) that since Necchi agreed only to "negotiate" about, but did not agree to "grant", a renewal, it is "impossible" to say what the relief for its failure to negotiate should be; that such failure presents no adequate basis for the assessment of damages because it was "conjectural" what the parties might have agreed upon, if they had negotiated, and:

> "Absent a clear definitive statement that the parties wish to litigate or arbitrate differences over the failure to engage in discussion relating to a renewal, and absent some indication as to how damages are to be fixed in case of a breach, the courts should hesitate before enforcing such a contract provision."

Whether or not the foregoing is a correct statement of principles of contract law, and of rules of damage, which would be applicable in a lawsuit (see *Helms* v. *Duckworth,* 249 F. (2d) 482 (U.S.C.A., D.C. 1957), discussed *infra,* pp. 24-6, in which the court was of a different opinion) it is, as we respectfully point out below (pp. 23-7) totally inapplicable and erroneous as applied to the powers of arbitrators.

With respect to Item 9, for reimbursement of moneys expended by Sales in advertising and promoting the name "Necchi", the learned Court of Appeals said (Exhibit F, *infra*, Supp. pp. 32-3):

> "Although common law principles of restitution might well support this claim for reimbursement * * * this claim is not founded on any provision of the 1961 agreement and hence the dispute is not arbitrable."

That view, we respectfully submit, was faulty. The question whether or not Necchi breached its Agreement by refusing to negotiate with reference to the extension of the 1962 Agreement or the making of a new one, as it had agreed to do, was clearly a question "arising out of or in connection with" the distributorship agreement (*infra*, pp. 24-9), and, as just noted, even the learned court below said that

> "common law principles of restitution might well support this claim."

As we show below (*infra*, pp. 24-9), if the arbitrators found that Necchi's conduct had not been *"ex bono et aequo,"* they would be authorized by the very language of the agreement (*infra*, Supp. p. 8) to decide what damages Sales should recover, and whether or not, or to what extent, such damages should include reimbursement of moneys theretofore expended by Sales in "advertising and promoting the name 'Necchi' "—the accumulated value of which, as exclusive distributor of Necchi products, Sales had built up, and of which it was automatically deprived by Necchi's breach.

"It is undoubtedly true" said the learned court below (*infra*, Supp. pp. 32-3):

> "that many of the matters referred to in items 1, 2, 3, 6, 7 and 9 would not have arisen if the exclusive distributorship arrangement had never existed between the Sales Corp. and Necchi."

"But", continued the Court:

> "this is not sufficient to render them arbitrable within the specific meaning of the arbitration clause of the 1961 agreement, which requires that the matter arise out of or in connection with that agreement rather than the working relationship between the parties."

This, we submit with great respect (see *infra*, pp. 28-30), overlooked the fact that paragraph 1 of the agreement of July 18, 1961 expressly states that the agreement "confirms" what the parties had agreed upon "concerning the terms and conditions that are to govern the business relation" of the parties.

POINT I

Certiorari should be granted so that this Court may finally settle the question whether the federal rule or a contrary state rule governs the interpretation of an arbitration clause—a question which this Court would have answered in the *Lawrence* case if the petition for certiorari there had not been dismissed on the stipulation of counsel, due to the settlement of the case.

Applying what it said is the federal rule, the learned court below held that the interpretation of the scope of the arbitration clause was for the court, not the arbitrators,* and denied arbitration of most of the disputes which Sales sought to have submitted to arbitration on the ground that, as construed by the court below, the arbitration clause did not cover them.

In any event, the premise that the question of interpretation is for the court is contrary to the law of the state of New York, as the same Court of Appeals expressly stated in *Lawrence* (1959, 271 F. 2nd, at page 402), where it also applied what it said was the federal rule, and this

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* The court below relied on cases decided by this Court under the National Labor Relations Management Act (*infra*, Supp. p. 29) which, as this Court has often noted, are decided in the light of the broad jurisdiction conferred on the federal courts by the Act, and by the federal policy behind it. Such cases, as this Court pointed out in *United Steelworkers* v. *Warrior* (363 U. S. 574, 578) are "irrelevant" to the "run of arbitration cases".

Other cases often cited are those in which the reluctant party claims that, for one reason or another, no valid, enforceable agreement to arbitrate exists. Such is not this case: here there is merely a question of the interpretation of what is, undisputedly, a valid, subsisting arbitration clause.

Court granted certiorari (362 U. S. 909), but did not decide the question because the petition was dismissed pursuant to stipulation of counsel (364 U. S. 801), the case having been settled, as we are informed, prior to the hearing here.

When, in holding that the arbitration clause did not give the arbitrators jurisdiction to construe that clause, the learned court below said (*infra*, Supp. p. 29)

"The arbitration clause is broad, but not that broad"

it took a position contrary to the one the same court took in *Lawrence*. There, referring to a clause not as broad as this one, i.e., a clause providing for the arbitration of (see 271 F. (2d) at p. 404)

> "any complaint, controversy or question which may arise with respect to this contract"

the court said (p. 412):

> "It would be hard to imagine an arbitration clause having greater scope than the one before us".

Not only is the arbitration clause here broader than it was in *Lawrence*, but it is important to note that both agreements here were prepared by Necchi; the language in them is Necchi's, and it should be construed most strongly against Necchi.

In *Maryland Telegraph Union* v. *Chesapeake*, 187 F. S. 101 (U. S. D. C., D. of Maryland, 1960), the court quoted with approval the following from an article by Professor Cox in 72 Harvard Law Review (1482, 1517 (1959):

> "Since the true nature of a grievance often cannot be determined until there is the full hearing of the

> facts, the reasonable course is to send all doubtful cases to arbitration, reserving for the right to vacate any award which undisputably goes beyond the scope of the agreement."

The party claiming that a particular dispute is not within the ambit of an arbitration clause has a "heavy burden"; any doubts "should be resolved in favor of arbitration" and an order to arbitrate should not be denied unless it can be said "with positive assurance" that the arbitration clause is "not susceptible to an interpretation that covers the asserted disputes". (*United Steelworkers* v. *Warrior*, 1959, 363 U. S. 574, 582-3.)

See also: *Metro Industrial Painting Corp.* v. *Terminal Const. Co.*, 287 F. 2d 382, 385 (2C, 1961); cert. denied 368 U. S. 817.

We submit that it may not be said with "positive assurance" that when these parties said that "all" disputes under or arising out of the agreement shall be determined by arbitrators, they used language which is "not susceptible" of an interpretation that they meant "all."

As this Court said in the *Steelworkers* case, 363 U. S. 564, 567-8, where parties agree that all questions should be arbitrated:

> "the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."

In *Bernhardt* v. *Polygraphic*, 350 U.S. 198 (1955), a case removed from the Vermont state court on the ground

of diversity, plaintiff claimed an improper discharge under an employment contract. The District Court denied a stay of arbitration on the ground (pp. 199-200) that the arbitration provision was governed by Vermont law, which authorized revocation of an agreement to arbitrate at any time before the award. The Court of Appeals reversed. On certiorari, this Court held that Congress may not legislate respecting substantive rights in diversity cases (pp. 202-203) and that the Vermont law governed; further (p. 202) that

> "The change from a court of law to an arbitration panel may make a radical difference in ultimate result"

and reversed and remanded to the District Court (p. 205).

Ross v. *Twentieth Century-Fox Film Corp.*, 236 Fed. 2d 632 (9C, 1956), was a common law action for breach of a California contract "evidencing a transaction in commerce" and containing an arbitration clause. On the question of the "interpretation of the contract" (p. 634) the Court of Appeals held (p. 634) that the question "whether the contract contains language which amounts to a provision for arbitration" would have to be determined by reference to California law.

In *American Air Lines* v. *Louisville & Jefferson C.A.V.*, 269 Fed. 2d 811 (6C, 1959), an action on an interstate commerce contract, the Court of Appeals stayed arbitration until the Kentucky court determined the enforceability of the arbitration provision.

A question as to whether or not the arbitrators were the ones to interpret an arbitration clause was presented

in *Lummis* v. *Commonwealth* (280 Fed. 2nd, 915, 1C., 1960), where the court said (p. 924):

> "This, however, is not a matter on which we feel free to follow our own views * * *. We think it clear that New York law must govern * * * [925] but for the present we feel constrained to accept as an established doctrine of New York law that the arbitration clause cannot be treated as separate from the other parts of the contract."

The ruling of the 2d Circuit here, as pointed out above, is to the contrary.

In *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. (2nd) 402 (1959), a case in which plaintiff claimed that defendant had fraudulently induced plaintiff to enter into the agreement, there was a provision for the arbitration of "any complaint, controversy, or question which arises with respect to this contract." The learned District Court, holding that fraud in the inducement would vitiate the contract, granted a stay of arbitration pending the judicial determination of the claim of fraud.

On the appeal to the Second Circuit, that learned court said (p. 404) that the "basic inquiry" must be: "Whether the validity and interpretation of the arbitration clause of the contract in this case is governed by Federal law, i.e., the federal Arbitration Act, or by local law." Stating (p. 412) that it disagreed with the holding of the New York Court of Appeals in *Wrap-Vertiser Corp.*, 3 NY (2d) 17 (1916), the learned 2nd Circuit ruled that it was the federal rule that interpretation of an arbitration clause is for the court, itself construed the clause, held that it covered the dispute, and directed that arbitration be stayed.

Unlike the Court of Appeals for the 1st Circuit in *Lummis supra*, the 2nd Circuit did not recognize the paramountcy of the New York rule; on the contrary, it said (271 F. 2nd at p. 412):

> "We note that were we compelled to apply New York law to the problems involved in this case, we would have been forced to arrive at a contrary conclusion."

This Court granted certiorari in *Lawrence* (362 U.S. 909) on three (3) questions, one of which may be paraphrased as follows: Where parties of diverse states have an interstate commerce contract containing an arbitration clause, is that clause to be interpreted according to federal law or according to a contrary rule applied in the said courts.

The question was not answered by this Court: the petition for certiorari was dismissed pursuant to stipulation of counsel (364 U. S. 801), the case having been settled, as we are informed, prior to a hearing on the petition.

The same question is presented in the present case and it is respectfully submitted that, for the same reasons as those which underlay the granting of the petition in *Lawrence*, the petition here should be granted.

POINT II

Even if the construction of the arbitration clause were for the court, it was error for the Court of Appeals to construe the clause on what the Court itself described as "the meager record before us." Inasmuch as the sense in which the words were used depends on the facts and circumstances and all other relevant evidence bearing on the intent of the parties, as well as the inferences which may be drawn therefrom, the learned Court of Appeals should have remanded the matter to the District Court.

In *Kennedy* v. *Silas Mason Co.* (334 U.S. 249, 1948), a suit for compensation under a cost-plus-fixed-fee contract, this Court, on certiorari, reversed a summary judgment granted by the Court of Appeals for the Fifth Circuit, pointing out that contracts should not be construed "without full background knowledge of the dealings of the parties" (p. 256) and of any "practical construction"; that this involves a consideration of "conflicting contentions of fact and inference from facts" and that this is a task "primarily" for the District Court. The Court said, further:

> "While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide"—

and, so saying, this Court vacated the judgment and remanded the case to the District Court "for reconsideration and amplification of the record."

Circuit Judge Kaufman, in his concurring opinion in *Livingston* v. *Wiley* (313 F. 2nd 52, 2C, 1962, aff'd 376 U.S. 898 (1964), stated (page 66), that in construing a contract in the light of the background and all other relevant facts, the arbitrator would be permitted to "imply" a term, even if it be not expressed.

In *Helms* v. *Duckworth*, 249 Fed. 2nd 482 (U.S.C.A., D.C., 1957), plaintiff sought to cancel a stock purchase by his decedent pursuant to an agreement between his decedent and the other stockholder in a close corporation. Both sides moved for summary judgment, and the District Court granted defendant's motion.

Upon reversing, the Court of Appeals considered whether to direct judgment or to remand, and said (p. 488):

> "Upon the present record, as we have indicated, appellant would be entitled to a summary judgment."

However, said the court (p. 488):

> "an appellee should be given the chance 'to dispute the facts material to a claim' where it appears the District Court did not consider such claim when passing upon the motion for summary judgment"

and

> "We are unable to state with a complete or absolute certainty that appellee does not possess additional facts bearing on this issue, and since the District Court has not yet exercised its informed discretion in this regard, we believe the wiser course is to remand the case for further proceedings."

The *Helms* case is apposite.

The Court of Appeals here recognized that the interpretation to be given the arbitration clause depends not only on the language of the agreement, but also on "the circumstances of the case" (*infra*, Supp. p. 33). These were not presented to, or considered by, the learned District Judge because of his view that the interpretation was for the arbitrators, and not for the court.

If the issue of arbitrability is for the court under the federal Arbitration Act (9 U. S. C., *infra*, Supp. pp. 24-5), there would have to be a "trial", as specifically required by Section 4 of that Act, in which, as the Second Circuit held in *Asheville et al.* v. *C. C. C.*, 335 F. (2d) 768 (1964), it would be the court's duty (p. 770) to take "oral testimony and documentary evidence" bearing on the intention of the parties in using the language they employed.

We submit, therefore, that even if the construction of the arbitration clause were for the court, the learned Court of Appeals should not, on the "meager record" before it, have construed it; that the matter should have been remanded to the District Court to get all the facts and circumstances bearing on the sense in which the word "all" was used, "amplifying" the record in that respect, if necessary, before attempting to determine whether, when the parties agreed that the arbitrators should determine "all" questions, they meant "all", or whether they meant "all except the interpretation of the arbitration clause itself and any disputes which, in a court of law, would not be justiciable."

POINT III

The learned court below denied arbitration of the most important item, not on the ground that it did not arise out of or in connection with the Agreement, but because, in the opinion of the Court of Appeals, it presents a claim which a court would not adjudicate. This was highly prejudicial error: a provision for submitting to arbitrators all claims which may arise "out of or in connection with" a contract does not limit the arbitrators to the consideration of claims which a court would entertain.

In paragraph 3(i) of the Agreement of July 18, 1961, the parties agreed (*infra*, Supp. p. 5) that before June 30, 1962 they

> "shall examine the possibility of executing a new and, it is hoped, long term distributorship agreement for the same territory and at such terms and conditions as will then be discussed and defined."

So important did the parties regard such a negotiation that, in the Extension Agreement of January 18, 1962, they provided (*infra*, Supp. pp. 12-13):

> "*Scheduled meeting of the Parties for the extension or the negotiation of new agreements.* (Italics in original.)
>
> The meeting between the Parties—which should have taken place within June 30, 1962, as foreseen by paragraph (i) for the examination of the extension or for the negotiation of new agreements—is similarly extended for one year *and will have to take place within June 30, 1963.*" (italics ours)

One of the most important items which petitioner sought to have arbitrated is number 8 of its Demand, to wit, Necchi's failure to negotiate concerning an extension of the distributorship agreement, or the making of a new one, as it expressly agreed to do in both the 1961 agreement and the 1962 agreement.

The learned court below did not deny arbitration of this item on the ground that it did not present a dispute "arising out of or in connection with this agreement", and there can be no question about the fact that it does so arise.

The court below held (*infra*, Supp. pp. 33-4) that this item is not arbitrable because, since the provision for negotiation does not impose on Necchi an obligation to "grant" a renewal or to enter into a new agreement, it is "impossible" to say what "relief" would be appropriate for Necchi's failure to negotiate on that subject; that damages for the failure to negotiate cannot be "assessed" because it is too "conjectural" as to what terms, if any, they would have agreed upon, even if they had negotiated in good faith. For these reasons, said the learned Court of Appeals, the courts should "hesitate" before "enforcing" such a contract provision, and it therefore held the item not arbitrable.

Here we have, we submit with great respect, a totally fallacious conception of the powers of arbitrators.

Even though the contract contained no obligation on Necchi's part to "grant" a renewal or make a new agreement, Necchi did agree that it would negotiate on that subject, and its failure to do so was a violation of its contractual obligation.

True, there is no provision fixing the relief to which petitioner would be entitled, or what its damage would be, in such event, but such omissions from the agreement would present no obstacle to relief by arbitrators. It is axiomatic that arbitrators are not subject to limitations which might obtain in court actions. If the arbitrators found that Necchi refused to enter into a negotiation about renewal, and particularly if they found Necchi did so unconscionably and in bad faith—as the undisputed facts would permit them to find—the arbitrators would have the right to grant such relief as to them seemed fair and just in the circumstances, even if a court would not entertain the claim. This freedom from legal rules and limitations, and the greater flexibility which obtains in an arbitration, could well have been the very reason the parties provided that the resolution of disputes be taken out of the courts and vested in arbitrators. Indeed, the parties left no doubt of their intention in this regard: they were at pains to provide that the arbitrators were to determine the disputes, not according to legalistic principles, but "ex bono et aequo" and, to insure that the award of the arbitrators, even if not in accord with legal principles, would not be disturbed, they provided, out of superabundant caution, that the arbitrators' award "shall not be subject to appeal."

In determining that the agreement to negotiate created no enforceable obligation because it was not coupled with a promise to grant an extension or make a new agreement, the learned court below held directly contrary to the Court of Appeals for the District of Columbia in *Helms* v. *Duckworth*, 249 F. 2d 482 (1957), a case strikingly similar to this one on its relevant facts.

The agreement in *Helms* provided (p. 484) that the survivor of the two contracting stockholders in a close corporation should pay $10.00 per share for the stock of the one dying first, provided, however, (p. 484), that by a writing signed by both parties in January of any year, "such sale and purchase price may from time to time be redetermined and changed."

Both sides there moved for summary judgment and the learned District Court, holding that the agreement did not obligate defendant to agree on any change in price, granted judgment for defendant.

The Court of Appeals reversed and remanded.

Referring to the provision of the agreement just described, the Court of Appeals in *Helms* pointed out that

> "Plainly this implied a periodic bargaining or negotiating process in which each party must participate in good faith (Cf: Chase National Bank vs. Manufacturers Trust Company, 1943, 265 App. Div. 406). Any other interpretation would render the procedure for adjusting the stock purchase price superfluous since parties to a contract can, at any time, mutually agree to renegotiate and modify specific terms or execute a new contract."

The Court of Appeals noted (p. 485) that the agreement "placed [plaintiff's decedent] dependent entirely upon [defendant's] good faith in negotiating" and continued: (pp. 485-6):

> "The very heart and core, then, of this agreement was the assumed willingness of each party to bargain

and negotiate in good faith whenever called upon to revise the price of the stock."

Citing from *N.L.R.B.* v. *Truitt*, 351 U.S. 149, the Court continued (p. 486):

> "Good faith in this context 'means more than going through the motions of negotiating; *it is inconsistent with a predetermined resolve not to budge from an initial position*' ". (italics by the Court).

Continuing in *Helms*, the Court of Appeals said (p. 486):

> "An ever higher obligation to bargain sincerely arises under a contract which is not made at arms length, but between parties bearing a relationship of trust and confidence toward each other. While both parties are free to argue and even disagree, each must argue sincerely and in good faith, disclosing all relevant facts, with the hope of reaching a fair agreement and not with a secret intent and preventing agreement."

Thus, the Court of Appeals here, in holding that Item 8 was not arbitrable because the contract imposed on Necchi an obligation only to negotiate, but not to agree, gave the provision here involved an interpretation and effect contrary to what the Court of Appeals for the District of Columbia gave to a like provision in the *Helms* case.

Like the situation in *Helms, supra,* and in *Gray Mfg. Co.* v. *Anemostat,* 64 NYS 2d, 815, not officially reported, the parties here were also in a confidential relationship. In the *Gray* case the court said (pp. 817-8):

"Respondent contends, however, that the parties have, by both contracts, brought themselves together into a position of confidential relationship * * * Whether the disputes in question do amount, in fact, to violations of the confidential relation are not our present concern. That the claims are cognizable as breaches of faith and within the contract is clear. * * * In short, the contract created a standard of conduct which respondent says was violated. It is for the arbitrators to determine what that standard is and whether it was maintained."

However, and quite apart from the strictly legal effect of the provision, the fact that it would not be enforceable in a court would not preclude arbitrators from granting such relief as they felt would be just and proper for a failure to perform it. Thus, in the *Steelworkers* case, 363 U. S. 564, this Court pointed out at page 567 that parties may submit grievances to arbitrators for the very reason that they anticipate the possibility of

"claims that courts might be unwilling to entertain * * * not merely those that a court may deem to be meritorious."

This is in accord with the public policy of the state of New York, as evidenced in its CPLR, Section 7051 (Exhibit I, *infra,* Supp. p. 37) which makes "enforceable" a written agreement to arbitrate "without regard to the justiciable character of the controversy" and directs that "the court shall not consider whether the claim with respect to arbitration is sought is tenable, or otherwise pass upon the merits of the dispute."

The case here, in this respect, is strikingly similar to *De Laurentiis* v. *Cinematografico*, 9 NY 2nd, 503, in which plaintiff claimed that his promises were "illusory" and, therefore, "unenforceable" (p. 508), and that a dispute as to his failure to comply with them was, consequently, non-arbitrable. In overruling that contention, Chief Judge Desmond said (p. 509):

> "The present agreement, as petitioner points out, does leave to future agreement the approval of the story outline and scenario and failure to approve might put an end to all the obligations. However, De Laurentiis and Campos expressly promised each other to consult at reasonable times and places during the preparation of the outline and of the scenario 'to the end that both De Laurentiis and Campos may make every effort in good faith to cause to be created, within the period specified herein a story outline, screen treatment and final scenario acceptable to both.' Thus, in addition to the implication of good faith read into every contract (see Wood v. Lucy, Lady Duff-Gordon, 222 N. Y. 88, 118 N. E. 214), we had an express promise of consultation and of good-faith effort to bring to completion a scenario of such form and quality as to be acceptable. *It is for the arbitrators to decide what, under all the circumstances, these covenants contemplated and whether petitioner did all that he was thereby required to do.*" (Italics ours.)

The learned court below ruled out any right of arbitration of Item "1" in the Demand for Arbitration, i.e. that Necchi cease and desist "soliciting, contacting or doing business with any of our (petitioner's) distributors and dealers" and from "unfair and tortious trade practices and unfair competition" because (*infra*, Supp. p. 32):

> "there is no plausible claim that any of these practices contravened the agreement, or that Necchi's conduct in these affairs was governed by the agreement."

That postulate, we submit, was erroneous.

If Necchi sold its machines directly to Sales' distributors, Necchi's conduct would be a violation of the legal duty of a manufacturer not to compete with its exclusive distributor. However, the arbitrators would not be precluded from making an award to Sales, even if Necchi's conduct were not such as would be found unlawful by a court. If the arbitrators found that Necchi's conduct was wrongful, when judged *"ex bono et aequo"*—the basis on which the agreement provides they shall "decide the issues" submitted to them (*infra*, Supp. p. 8)—they would be authorized to award Sales whatever damages they found Sales had suffered therefrom, irrespective of whether or not the claim was one enforceable in a court.

After discussing the items petitioner seeks to have arbitrated, the learned court below said (*infra*, Supp. pp. 32-3):

> "It is undoubtedly true that many of the matters referred to in items 1, 2, 3, 6, 7 and 9 would not have arisen if the exclusive distributorship arrangement had never existed between the Sales Corp. and Necchi. But this is not sufficient to render them arbitrable within the specific meaning of the arbitration clause of the 1961 agreement, which requires that the matter arise out of or in connection with that agreement rather than the working relationship between the parties."

This reasoning, we respectfully submit, was fallacious. The learned Court of Appeals overlooked the fact that the agreement of July 18, 1961 states (*infra*, Supp. p. 1) that it

> "confirm[s] * * * the conversations and verbal understandings arrived at with you in Pavia, June 1961 *concerning the terms and conditions that are to govern the business relationship between" the parties.* (Italics ours.)

Thus, the agreement delineated and defined the "working relationship of the parties," and a violation of them would *ipso facto*, be a violation of the agreement.

Conclusion

It is, therefore, respectfully prayed that this petition for a writ of certiorari be granted.

December 29, 1965

Respectfully submitted,

SAMUEL B. HERBST
Attorney for Petitioner

GEORGE TROSK
Of Counsel

SUPPLEMENT

Exhibit A

Agreement of July 18, 1961

Necchi Sewing Sales Corp.
164 West 25th Street
New York, New York
July 18, 1961

Dr. Vittorio Necchi, President
Necchi S. P. A.
Pavia

Dear Dr. Necchi:

I hereby confirm on behalf of Necchi Sewing Machines Sales Corporation of New York, N. Y., and its affiliated companies, as per attached sheet, hereinafter called for brevity "Necchisew", the conversations and verbal understandings arrived at with you in Pavia, June, 1961, concerning the terms and conditions that are to govern the business relationship between Necchi S. P. A. of Pavia and Necchisew (and affiliated Companies) from this date until December 31st, 1962.

1. Any and all previous understandings, pacts or agreements, formal or informal, written or verbal, explicit or implicit, between Necchi S. P. A. and Necchisew are cancelled and terminated for all effects and purposes as of this date. No further reciprocal obligation shall remain between Necchi S. P. A. of Pavia and Necchisew except such payments as may be due in connection with unpaid supplies or other outstanding invoices or debit notes, and except as provided in paragraph 2 hereinbelow.

2. The license to use the name and trademark Necchi and any other trademarks which identify or may identify the production of Necchi S. P. A. as previously granted under the agreement of June 8, 1956, is extended in favor of Necchisew until December 31, 1962, subject to conditions and restrictions contained in such agreement.

3. As from this date and until December 31, 1962, unless extended as hereinafter provided for) Necchisew undertakes the following obligations:

a) Necchisew shall distribute and service NECCHI SEWING MACHINES in the territory of the fifty States of the Union, the District of Columbia, Pribilof, St. Lawrence, St. Matthews Island, Puerto Rico, Virgin Islands, Midway Islands, Wake Islands, Guam Island, Canton, Enderbury Islands, American Samoa, Tutuila Islands and Dependencies (hereinafter called "the Territory"). With regard to free arm sewing machines of your production, the parties at the request of the most dilegent party, shall examine in

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January, 1962, the problem of their distribution and sale in the Territory.

The above activities shall be hereinafter referred to as the "Exclusive Distributorship" granted by Necchi S. P. A. to Necchisew. The relations between Necchisew and its employees, aides, subdistributors, dealers and customers shall never involve Necchi S. P. A. of Pavia.

The Distributorship shall not be assignable or transferable in whole or in part.

b) The activities of Necchisew shall be carried out exclusively in the Territory. Necchisew shall be responsible for all the consequences of any sale or other invasion on its part or on the part of any of its affiliated companies of markets outside of the Territory.

c) Necchi S. P. A. declares that it has no objection to Necchisew also continuing to distribute and sell household sewing machines produced by the Tavaro Co. of Geneva, Switzerland, through separate importing and distributing companies as presently done.

d) Since the Exclusive Distributorship presupposes an adequate volume of sales of the produuct in the Territory, Necchisew shall order and take delivery before December 31, 1962, of a quantity of sewing machines which it shall consider fit and necessary to the above effect. At least thirty (30%) per cent of said quantity shall be NECCHI AUTOMATIC SUPERNOVA JULIA machines.

The purchase and sale program shall be prepared quarterly and communicated to Necchi S. P. A. in advance. Specific orders with shipping and invoicing instructions shall be sent monthly in the first half of the month preceding the month of shipment.

Necchisew's stock of Necchi machines, including machines in transit or on order, shall not at any time during the term of this agreement exceed three (3) months' estimated requirements.

e) Current prices of sewing machines shall always be promptly notified by Necchi S. P. A. of Pavia to Necchisew. Confirmed orders shall not be subject to price change. Shipments of sewing machines and spare parts will be carried out in the customary fashion.

f) Payments for all shipments hereunder shall be by accepted drafts, due three (3) months from date of invoice.

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g) Necchisew shall periodically report to Necchi S. P. A. of Pavia the following:

1) Monthly—stock inventory to be compiled on the special form it will receive for this purpose;

2) quarterly—list of subdistributors, their place of business and responsible territory;

3) quarterly—a report as to the actual gross sales made to subdistributors and dealers.

h) The exclusive distributorship herein provided shall continue until December 31, 1962, provided all the obligations hereunder are fully observed; default in the performance of any of the terms hereof may result in the immediate termination hereof, without prejudice to any claim for damages. Merchandise stock on hand at the time of termination, shall be disposed of by Necchisew within three (3) months thereafter.

i) Six (6) months before the expiration of this agreement, that is, before June 30, 1962, Necchisew and Necchi S. P. A. of Pavia, shall examine the possibility of executing a new and, it is hoped, long term distributorship agreement for the same territory and at such terms and conditioins as will be then discussed and defined. In the event such an agreement is not reached, the present agreement will be terminated on December 31, 1962, without need of any advance notice and without any right accruing to either party to make any claim whatsoever for damages or otherwise, by reason of such termination.

j) The parties acknowledge that in the event the distributorship should come to an end on December 31, 1962, as herein provided, it will be in the mutual interest that Necchisew's stock of Necchi Sewing Machines be completely sold out by that date. If in spite of the most accurate calculations and of the best efforts, this should not be achieved, the possibility of extending the Necchisew's sales operations for no more than two (2) months shall be considered.

With regard to accessories and spare parts of Necchi production stocked by Necchisew on December 31, 1962, Necchi S. P. A. undertakes to repurchase a portion thereof for a value of up to seventy-five thousand dollars ($75,000) calculated at the original invoice prices, provided the same is found in perfect conditiion.

k) In the event a new distributorship agreement is not executed, as contemplated in paragraph (i) above, Necchisew undertakes to continue its activities and sales organization in a proper and fair manner until the date of termination of this agreement, cooperating with Necchi S. P. A. of Pavia

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in order to insure that the work accomplished by both parties will not be wasted and that the name "Necchi" will not be damaged in any way.

l) Unless the distributorship is terminated before December 31, 1962, by reason of Necchisew's default, Necchi S. P. A. of Pavia shall undertake upon termination of this distributorship agreement, all servicing of Necchi sewing machines sold by Necchisew in conformity with the standard form of "guarantee" in use, provided, however, that in the event Necchi S. P. A. should withdraw from the American market, then the servicing obligations under the standard form of "guaranty" will be carried out by Necchisew to whom Necchi S. P. A. shall supply such spare parts as may be needed.

m) All matters, disputes or disagreements arising out of or in connection with this Agreement shall be finally settled by three (3) Arbitrators appointed as follows: Each party shall appoint an Arbritrator, and the two thus selected shall designate a third. If either of the parties shall fail to appoint its Arbitrator within thirty (30) days after receipt of notice of the appointment by the other party of its Arbitrator, or if the two Arbitrators so appointed shall fail to appoint the third within a period of thirty (30) days, then the Chief Judge of the District Court of the United States of America for the Southern District of New York shall have the power at the request of either party and after ten (10) days' notice from the requesting party to the other

party to make the appointment(s) not made as contemplated above. Any such arbitration is to be held in the City of New York, New York, United States of America. The Arbitrators shall decide the issue(s) ex bono et aequo and their award shall not be subject to appeal. A judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction to enter such judgment.

n) All notices given hereunder shall be in writing by certified or registered air mail, addressed to the parties at their respective addresses as herein set forth.

Sincerely yours,

NECCHI SEWING MACHINE
SALES CORP.

Accepted: Necchi S. P. A. by /s/ LEON JOLSON
NECCHI president

MANIDI by /s/ BENJAMIN KRISILOFF
Sec

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63 WALL STREET
NEW YORK 5, N. Y.

SCHEDULED CORPORATIONS

NECCHI HOME ARTS ASSOCIATES INC.

By /s/ LEON JOLSON
President

/s/ BENJAMIN KRISILOFF
Secretary

NECCHI CABINET CORPORATION

By /s/ LEON JOLSON
President

/s/ BENJAMIN KRISILOFF
Secretary

NECCHI CORPORATION OF CALIFORNIA

By /s/ LEON JOLSON
President

/s/ BENJAMIN KRISILOFF
Secretary

NECCHI DISTRIBUTORS OF ILLINOIS, INC.

By /s/ LEON JOLSON
President

/s/ BENJAMIN KRISILOFF
Secretary

NECCHI PURCHASING CORPORATION

By /s/ LEON JOLSON
President

/s/ BENJAMIN KRISILOFF
Secretary

NECCHI SEWING CIRCLE INC.

By /s/ LEON JOLSON
President

/s/ BENJAMIN KRISILOFF
Secretary

NECCHI EXPORT CORPORATION

By /s/ LEON JOLSON
President

/s/ BENJAMIN KRISILOFF
Secretary

NECCHI DISTRIBUTORS OF L. A. INC.

By /s/ LEON JOLSON
President

/s/ BENJAMIN KRISILOFF
Secretary

NECCHI SEWING MACHINE DISTRIBUTORS OF S. F. INC.

By /s/ LEON JOLSON
President

/s/ BENJAMIN KRISILOFF
Secretary

NECCHI FOUNDATION INC.

By /s/ LEON JOLSON
President

/s/ BENJAMIN KRISILOFF
Secretary

Exhibit B

Agreement of January 18, 1962

NECCHI

SOCIETA PER AZIONI — CAPITALE L. 2,000,000,000
INTERAMENTE VERSATO

Telegrammi: NECCHIVIT
Casello Postali N. 148 . 154
C. C. I. A. PAVIA N. 58521
TELEFONI N. 27.341 . 27.641
10 linee con ricorce automatica

Messrs.

NECCHI SEWING MACHINE SALES CORPORATION
164 West 25th Street
NEW YORK — (Stati Uniti)

DIREZIONE COMMERCIALE ESTERO

DA CITARE NELLA RISPOSTA

VS/RIFER	DATA VS/LETT	RIFER.	SIGLA
		4130/21	

PAVIA
January 18, 1962

Gentlemen:

With reference to the agreements reached last year between our Company and the Necchi Sewing Machine Sales Corporation of New York and Affiliated Companies (hereinafter called for bervity NECCHISEW), agreements detailed in your letter of July 18, 1961, which has been countersigned by us, as well as to the meetings with your President, Mr. Leon Jolson, held in Pavia on January 16, 17 and 18, 1962, during which an ampler work program has been envisaged, we summarize hereunder what has been mutually agreed upon.

1°) *Extension of the agreement dated July 18, 1961.*

As a partial amendment to paragraph h) of the above-mentioned letter, the expiry date of the agreement dated July 18, 1961, formerly set at December 31, 1962, is extended for one year, that is to December 31, 1963. The same extension is agreed upon for all the clauses or paragraphs which foresee the term in question.

2°) *Scheduled meeting of the Parties for the extension or the negotiation of new agreements.*

The meeting between the Parties—which should have

./.

NECCHI
SOCIETA PER AZIONI
PAVIA (ITALY)

Segulto foglio N. — 2 —

taken place within June 30, 1962, as foreseen by paragraph i) for the examination of the extension or for the negotiation of new agreements—is similarly extended for one year and will have to take place within June 30, 1963.

3°) *Price reductions*

Following and depending on the quantity of 25,000 sewing machines (of which at least 30% AUTOMATIC SUPERNOVA JULIA), which has been agreed to be acquired in the course of 1962—with a first firm order placed with us to-day for 12,000 sewing machines—NECCHI S. p. A. of Pavia grants NECCHISEW the following price reductions:

—for the AUTOMATIC SUPERNOVA JULIA head	from $80.10 to $75.00
—for the LELIA 514 head	from $57.25 to $55.00
—for the LELIA 510 head	from $29.25 to $28.00
—for 1,000 BU NORA heads	from $47.80 to $42.00

The above prices are meant for goods delivered fob Genoa, packing included.

Said price reductions will be applied starting with the first partial shipment of the 12,000 machines already on order and for the quantities agreed to be purchased in 1962.

Mr. Leon Jolson however, agrees that—in case the orders should not reach in the course of 1962 the above referred quantity of 25,000 units—NECCHI S. p. A. of Pavia is from now on authorized to debit NECCHISEW with the amount corresponding to the practiced price reductions, as these reductions depend on the effective fulfillment of the agreement regarding the quantities to be purchased.

4°) *Terms of payment.*

Consequently to the scheduled total quantities to be purchased by NECCHISEW in 1962, NECCHI S. p. A. of

./.

NECCHI
SOCIETA PER AZIONI
PAVIA (ITALY)

Segulto foglio N. — 3 —

Pavia will apply longer terms of deferred payment to the 1962 sewing machine supplies, extending them from 90 to 120 days against accepted draft.

5°) *LYCIA machines.*

In compliance with paragraph a) of the agreement dated July 18, 1961, a pilot supply of 300 units (250 AUTOMATIC and 50 ZIG-ZAG) has been agreed with your President, in order to place your Company in a position of conducting a test for their possible sale on the American market.

Such test has to be completed in a period of time not exceeding two months from the date of arrival of the machines to New York.

At the expiry date of the two months, we must be informed about the result of the test in detail.

In case of a positive result, NECCHISEW will place orders for LYCIA sewing machines during 1962 on the minimum basis of 500 units a month.

Such quantities have to be considered as an addition to the abovementioned 25,000 unit engagement.

In case of an unfavourable result, any obligation as to the supply of LYCIA models from NECCHI S. p. A. of Pavia to NECCHISEW will be no longer valid.

6°) ***Prices for LYCIA sewing machines.***

In consideration of an annual quota of 6,000 units for 1962, NECCHI S. p. A. of Pavia will grant NECCHISEW exceptionally favourable prices by supplying LYCIA sewing machines at:

—$72.00 for the LYCIA 522

—$92.00 for the LYCIA 524

for goods delivered fob Genoa, packing included. The abovementioned exceptional prices will be also applied to the pilot supply.

NECCHI
SOCIETA PER AZIONI
PAVIA (ITALY)

Segulto foglio N. — 4 —

Your President and ourselves agreed fully on the above detailed points, as well as on the extension of the validity of all the other clauses and obligations of the agreement dated July 18, 1961, which remain valid and binding and are ratified by the present letter.

This letter is drawn up in two originals which your President, Mr. Leon Jolson, and our General Manager, Mr. Giuseppe Manidi, undersign in full and final acceptance.

NECCHI SEWING MACHINE SALES CORPORATION	NECCHI Societa per Azioni
/s/ LEON JOLSON	/s/ GIUSEPPE MANIDI
Leon Jolson, President	Giuseppe Manidi, General Manager

Agreement, Dated January 18, 1962

6°) *Prices for Lycia sewing machines.*

In consideration of an annual quota of 6,000 units for 1962, Necchi S.p.A. of Pavia will grant Necchisew exceptionally favourable prices by supplying Lycia sewing machines at:

—$72.00 for the Lycia 522

—$92.00 for the Lycia 524

for goods delivered fob Genoa, packing included.

The abovementioned exceptional prices will be also applied to the pilot supply.

Your President and ourselves agreed fully on the above detailed points, as well as on the extension of the validity of all the other clauses and obligations of the agreement dated July 18, 1961, which remain valid and binding and ratified by the present letter.

This letter is drawn up in two originals which your President, Mr. Leon Jolson, and our General Manager, Mr. Giuseppe Manidi, undersign in full and final acceptance.

NECCHI
Societa per Azioni

.....

GIUSEPPE MANIDI,
General Manager.

NECCHI SEWING MACHINE
SALES CORPORATION

.....

LEON JOLSON,
President.

Exhibit C

Demand for Arbitration

(R. pp. 18-19)

NECCHI SEWING MACHINE SALES CORP.
164 West 25th Street
New York 1, N. Y.

May 22nd, 1964

Necchi S.P.A.
Pavia,
Italy.

Gentlemen:

We are now repeating formally our demand for arbitration of our matters, disputes and disagreements against you, pursuant to the agreement between us dated July 18th, 1961, paragraph "m)" thereof:

1. To compel you to cease and desist from:

   a. Soliciting, contacting or doing business with any of our distributors and dealers;

   b. Unfair and tortious trade practices and unfair competition.

2. You are liable and responsible to us for all damages and losses suffered or incurred by us by reason of the foregoing and an accounting for such damages is being demanded herein.

3. Our claim for $25,000 against you for the negotiations and arrangements made with Brother International, as agreed.

4. You are to repurchase from us parts and accessories for a value up to $75,000.

5. You are to assume and take over all of our responsibilities under the Necchi warranty.

6. You are to assume and pay us for such Necchi "equipment" supplied by us to and in your possession and control and for such equipment in our possession, intended for inclusion in Necchi machines.

7. You are to assume our liceses and obligations under agreements between Julius Hochman and us, pay us all monies due from you to us related to the Julius Hochman inventions, and reimburse us for all monies and property expended by us in connection with the development, improvement and promotion of the Julius Hochman inventions.

8. Your failure to negotiate in good faith with us for an extension of the distributorship agreement between us and an accounting by you for all damages suffered or occasioned by us thereby.

9. Reimbursement to us to the extent of your responsibility to us for the monies expended by us during the past 16 years advertising and promoting the name "Necchi".

As you were heretofore notified in our letter to you dated March 2nd, 1964, we appointed A. P. Bersohn, Esq. of 551 Fifth Ave., New York, N. Y. as our arbitrator. In the same letter we called upon you to appoint an arbitrator so that the two arbitrators could then proceed as provided in the above referred to agreement as expeditiously as possible. You chose to disregard our notice and demand, and we are now advising you that unless you appoint your arbitrator forthwith and advise us his name within ten (10)

days from date of this letter, we shall be constrained to proceed without any further delay.

Very truly yours,

NECCHI SEWING MACHINE SALES CORP.
LEON JOLSON
Leon Jolson,
President.

BENJAMIN KRISILOFF

B. M. Krisiloff,
Secretary.

LJ/ss
Registered Mail—R.R.R.
cc Necchi S.P.A., Suite 1302, 375 Park Ave., New York, N.Y.
cc Fink & Pavia, Esq., 63 Wall St., New York, N. Y.

Exhibit D

Decision and Order of Ryan, *D. J.*

NECCHI S.P.A.,

v.

NECCHI SEWING MACHINE SALES CORP.,,
64 Civ. 1938,

NECCHI SEWING MACHINE SALES CORP.,

and

NECCHI S.P.A.—64 *Civ.* 2043

ENDORSEMENT

We have three motions before us; all three motions are considered and determined by this memorandum endorsement.

In civil suit (64 Civ. 2043), Necchi Sewing Machine Sales Corp. sues to compel arbitration under an agreement of July 18, 1961 with Necchi S. P.A. and now moves for an order appointing an arbitrator. In this same suit, Necchi S.P.A. moves for a stay pending determination of the civil suit filed by it in this Court for a declaratory judgment (64 Civ. 1938). Necchi Sewing Machine Sales Corp. moves to dismiss this suit filed of a declaratory judgment.

The agreement of July 18, 1961 by its terms, provides that

> "All matters, disputes or disagreements arising out of or in connection with this agreement shall be

* References to record page number are to certified record in Docket 29340.

finally settled by three (3) Arbitrators appointed * * * etc."

By letter dated May 22, 1964, Necchi Sewing Machine Sales Corp. "demanded" that Necchi S.P.A. arbitrate nine listed matters. Whether or not these matters "arise out of" or are "in connection with" the agreement of July 18, 1961, we do not now finally determine; nor is it necessary for us to do so. The broad scope of the arbitration provisions precludes us from preliminary inquiry as to whether the nine listed items arise "out of or in connection with the agreement." (*Matter of Exercycle Corp.*, 9 N. Y. 2d 334, 335). Likewise, we do not concern ourselves with the merits of the contentions of the parties.

Necchi S. P.A. recognizes and does not dispute that since Necchi Sewing Machine Sales Corp. "has commenced a proceeding for affirmative relief, the issues raised in the declaratory judgment action can also be determined in this proceeding."

The motion to dismiss "64 Civil 1938" is granted and the Clerk is directed to forthwith enter a judgment of dismissal in that suit, without prejudice and without costs.

The motion to stay this suit "64 Civil 1938" has become moot by its dismissal, and that motion is marked withdrawn.

The motion in suit (64 Civil 2043) to direct Necchi S.P.A. to proceed with arbitration is granted and it is directed to nominate and appoint an Arbitrator within 20 days from the date hereof, and in the event of its failure to do so, an order may be submitted on 5 days' notice and the Court will appoint an Arbitrator. So ordered.

Dated: September 10, 1964.

SYLVESTER J. RYAN,
U.S.D.J.

Exhibit E

9 U. S. C. §§4, 5

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in whcih the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the no-

tice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. July 30, 1947, c. 392, §1, 61 Stat. 669.

§5. Appointment of arbitrators or umpire.

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator. July 30, 1947, c. 392, §1, 61 Stat. 669.

Exhibit F

Opinion of the United States Court of Appeals for the Second Circuit

Before:

LUMBARD, *Chief Judge,*
MOORE and MARSHALL, *Circuit Judges.*

Consolidated appeals from an order of the District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge,* dismissing without prejudice a declaratory judgment action seeking to determine the arbitrability of certain disputes and, in a proceeding commenced under sections 4 and 5 of the Federal Arbitration Act, 9 U. S. C. §§4, 5, directing the reluctant party to proceed to arbitration and to appoint an arbitrator.

The order is affirmed insofar as it dismisses the declaratory judgment action without prejudice; but insofar as it compels arbitration it is affirmed in part and reversed in part.

DAVID A. BOTWINIK, New York, N. Y. (Fink & Pavia, on the brief) (Murray Mogel, of counsel), *for Respondent-Appellant.*

SAMUEL B. HERBST, New York, N. Y. (Herbst & Herbst, on the brief) (Allan D. Goodridge, of counsel), for *Petitioner-Appellee.*

MARSHALL, *Circuit Judge:*

From 1948 through 1963, Necchi Sewing Machine Sales Corporation (hereinafter "the Sales Corp.") was the exclusive American distributor of sewing machines manufactured by Necchi. This relationship was based on a series of contracts; the one involved in these appeals was executed on July 18, 1961 and amended by a subsequent agreement dated January 18, 1962 whereby the exclusive distributorship was extended until December 31, 1963.

The 1961 agreement provided that "All matters, disputes or disagreements arising out of or in connection with

this Agreement shall be finally settled" by arbitration, and this provision was invoked when the relations between Necchi and the Sales Corp. deteriorated at the end of 1963 upon the refusal of Necchi to renew the exclusive distributorship with the Sales Corp.[1] In January and March of 1964 the Sales Corp. demanded that certain disputes be arbitrated, and on May 22 of that year it sent a letter to Necchi, set out in the appendix, detailing its demand for arbitration. The arbitration provision gave the party upon whom a demand to arbitrate was served thirty days to appoint an arbitrator; and this period expired on June 22. On that date, having not yet appointed an arbitrator, Necchi commenced an action in the District Court for the Southern District of New York. Jurisdiction was based on diversity of citizenship, 28 U. S. C. §1332, and, pursuant to 28 U. S.C. §2201, Necchi sought a declaratory judgment that the items tendered by the Sales Corp. for arbitration were not arbitrable. On the same day, June 22, the Sales Corp., pursuant to sections 4 and 5 of the Federal Arbitration Act, 9 U. S. C. §§4, 5, petitioned the District Court for the Southern District of New York to appoint a second arbitrator and to direct Necchi to proceed to arbitration. The petition alleged diversity jurisdiction and also that the 1961 agreement evidenced transactions in interstate and foreign commerce.

In an order dated September 3, 1964 the District Court dismissed without prejudice Necchi's declaratory judgment

[1] There can be no doubt that the obligation to arbitrate survives the termination date of the exclusive distributorship agreement in the sense that arbitration can be compelled after that date, provided, of course, that the matter, dispute or disagreement "arises out of or in connection with the agreement." See *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

action and granted the petition of the Sales Corp. Necchi was ordered to proceed to arbitration and to appoint an arbitrator within twenty days, in default of which an arbitrator wiuld be appointed by the court. Notices of appeal were timely filed and served by Necchi in both proceedings. We affirm the order of the District Court insofar as it dismisses, without prejudice, Necchi's declaratory judgment action, for, as the District Court correctly reasoned, the issues raised in that action can also be determined in the proceeding initiated by the Sales Corp. It was within the discretion of the District Court to dismiss the parallel and duplicative action seeking declaratory judgment, see *Dr. Beck & Co. G.m.b.H.* v. *General Electric Co.*, 317 F. 2d 538, 539 (2 Cir. 1963). But insofar as the order of the District Court directs Necchi to proceed to arbitration, we affirm in part and reverse in part.

The basic flaw in the order compelling Necchi to arbitrate stems from the approach of the District Court. The Court declined to decide whether the nine items listed in the Sales Corp's letter were "matters, disputes or disagreements arising out of or in connection with" the agreement. Instead the court took the position that this decision was to be made by the arbitrators, reasoning that "the broad scope of the arbitration provisions precludes us from [making the] preliminary inquiry as to whether the nine listed items arise 'out of or in connection with the agreement.'" This was error, and quite clearly so. An order under the Federal Arbitration Act compelling a party to arbitrate is simply an order granting specific performance of an arbitration provision, *Kulukundis Shipping Co., S/A* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 986 (2 Cir. 1942), and a court must interpret that provision to determine whether

it requires arbitration on certain items prior to granting such relief. The court must decide whether the parties had agreed to submit the particular disputes to arbitration. Neither the federal policy in favor of arbitration nor the ostensible broad reach of the arbitration provision in question relieves the District Court of judicial responsibility of determining the question of arbitrability, unless the arbitration provision is so unusually broad that it clearly vests the arbitrators with the power to resolve questions of arbitrability as well as the merits, see *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 583 n. 7 (1963). The arbitration provision here is broad, but not that broad.

The Supreme Court has explicitly and unanimously reserved the question of arbitrability for the courts. "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties," *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962). "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," *United Steelworkers* v. *Warrior & Gulf Nav. Co., supra*, 363 U. S. at 582. Accord, *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 547 (1964). This principle has been annunciated in actions to compel arbitration that were commenced under section 301 of the Labor Management Relations Act, 29 U. S. C. §185, but we can perceive no reason why this principle should not be equally applicable in proceedings to compel arbitration that are, like the instant one, commenced under the Federal Arbitration Act, cf. *Engineers Ass'n* v. *Sperry Gyroscope Co.*, 251 F. 2d 133, 135 (2 Cir. 1957), *cert. denied*, 356 U. S.

932 (1958). In fact this principle has been applied with little need for discussion in proceedings under the Federal Arbitration Act, see, e.g., *Metro Industrial Painting Corp.* v. *Terminal Constr. Co.*, 287 F. 2d 382, 385 (2 Cir.), *cert. denied*, 368 U. S. 817 (1961); *Greenwich Marine Inc.* v. *S.S. Alexandra*, 225 F. Supp. 671, 676 (S. D. N. Y. 1964), *aff'd*, 339 F. 2d 901 (2 Cir 1965); *cf.* also *Reconstruction Fin. Corp.* v. *Harrisons & Crosfield, Ltd.*, 204 F. 2d 366, 368 (2 Cir.) (dictum), *cert. denied*, 346 U. S. 854 (1953). The language of section 4 of the Act requires no less: the reluctant party can only be ordered "to proceed to arbitration in accordance with the terms of the agreement."

Hence, the District Court had the responsibility of determining whether each of the nine items listed in the Sales Corp.'s letter demanding arbitration was a matter, dispute or disagreement "arising out of or in connection with" the 1961 agreement. The District Court failed to fulfill this duty and we thus have the alternative of making the determination for ourselves or remanding to the District Court. In respect to all the items, even on the meager record before us, the question of arbitrability seems so clear that no useful purpose would be served by leaving the question to be resolved by the District Court upon further proceedings, and in order to expedite this litigation, we will rule on the arbitrability of each of the items. Cf. *Livingston* v. *John Wiley & Sons, Inc.*, 313 F. 2d 52 (2 Cir.), *aff'd*, 376 U. S. 543 (1964).

Items 4 and 5 are arbitrable, for they directly relate to certain provisions[2] in the agreement and the order below insofar as it directs Necchi to proceed to arbitration on those items is affirmed. It seems equally clear that items 1, 2, 3, 6, 7 and 9 are not arbitrable, and the order below insofar as it directs Necchi to proceed to arbitration on those items is reversed. Notwithstanding "the federal policy to construe liberally arbitration clauses," *Metro Industrial Painting Corp.* v. *Terminal Const. Co.*, 287 F. 2d 382, 385, *cert. denied*, 368 U. S. 817 (1961), and the Federal Arbitration Act's "liberal policy of promoting arbitration," *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402, 410 (2 Cir. 1959), *cert. granted*, 362 U. S. 909, *cert. dismissed pursuant to stipulation*, 364 U. S. 801 (1960), there is no basis for maintaining that the matters referred to in items 1, 2, 3, 6, 7 and 9 arise out of or in connection with the agreement.

Item 1 seeks to have Necchi "cease and desist" from engaging in certain practices claimed to constitute unfair trade practices and item 2 seeks "damages" and "account-

[2] "3(j) . . . With regard to accessories and spare parts of Necchi production stock by Necchisew [The Sales Corp.] on December 31, 1962 [later amended to "1963"], Necchi S.p.A. undertakes to repurchase a portion thereof for a value of up to seventy-five thousand dollars ($75,000) caluculated at the original invoice prices, provided the same is found in perfect condition."

"3(1) Unless the distributorship is terminated before December 31, 1962 [later amended to "1963"], by reason of Necchisew's default, Necchi S.p.A. of Pavia shall undertake upon termination of this distributorship agreement all servicing of Necchi sewing machines sold by Necchisew, in conformity with the standard form of 'guaranty' in use, provided, however, that in the event Nechi S.p.A. should withdray from the American market, then the servicing obligations under the standard form of 'guaranty' will be carried out by Necchisew to whom Necchi S.p.A. shall supply such spare parts as may be needed.

ing" for these practices. But there is no plausible claim that any of these practices contravened the agreement, or that Necchi's conduct in these affairs was governed by the agreement. The claim referred to in item 3 relates to services performed by the president of the Sales Corp. in attempting to settle a dispute between Necchi and another manufacturer involving a charge of patent infringement. This dispute has nothing to do with the 1961 exclusive distributorship agreement between Necchi and the Sales Corp. and the understanding upon which the president allegedly acted was entered into prior to that agreement. Item 6 also does not present an arbitrable dispute. Assuming that the equipment referred to in that item is not the "parts and accessories" referred to in item 4, there is no provision in the 1961 agreement that directs the Sales Corp. to supply "equipment . . . intended for inclusion in Necchi machines," nor is there any provision that obliges Necchi "to assume and pay" the Sales Corp. for such equipment. If the equipment in item 6 is the same as that of item 4, then the order directing arbitration on item 4 will suffice. The matter referred to in item 7 has been governed by a contract entered into by Necchi and the Sales Corp. in 1958, and that contract, one without an arbitration provision, has remained distinct and separate from the 1961 exclusive distributorship agreement containing the arbitration provision. Item 9 demands "reimbursement . . . for the monies expended by us during the past 16 years advertising and promoting the name" Necchi. Although common law principles of restitution might well support this claim for reimbursement, an issue upon which we express no opinion, this claim is not founded on any provision of the 1961 agreement and hence the dispute is not arbitrable. It is undoubtedly

true that many of the matters referred to in items 1, 2, 3, 6, 7 and 9 would not have arisen if the exclusive distributorship arrangement had never existed between the Sales Corp. and Necchi. But this is not sufficient to render them arbitrable within the specific meaning of the arbitration clause of the 1961 agreement, which requires that the matter arise out of or in connection with that agreement rather than the working relationship between the parties.

We also hold that, in light of the circumstances of this case and language of the 1961 agreement, item 8 is not arbitrable. This item charges Necchi with failing to negotiate in good faith an extension of the distributorship agreement. The 1961 agreement provides that six months before its expiration both parties "shall examine the possibility of executing a new and, it is hoped, long term distributorship agreement for the same territory and at such terms and conditions as will be then discussed and defined."[3] This paragraph, however, does not impose an obligation on Necchi to grant a renewal of the distributorship and it is impossible to say what relief would be appropriate if Necchi failed to examine the possibility of a renewal. Certainly, we cannot ask that a renewal contract be written for the parties, as it is altogether too conjectural that the parties would have agreed and on

[3] "3(i) Six (6) months before the expiration of this agreement, that is, before June 30, 1962, Necchisew and Necchi S.p.A. of Pavia, shall examine the possibility of executing a new and, it is hoped long term distributorship agreement for the same territory and at such terms and conditions as will be then discussed and defined. In the event such an agreement is not reached, the present agreement will be terminated on December 31. 1962, without need of any advance notice and without any right accruing to etiher party to make any claim whatsoever for damages or otherwise, by reason of such tetrmination."

what terms. It is impossible to assess any damages, as there is no way that anyone could foresee what would have come from examining the possibility of executing a new contract, even if this were done in the utmost good faith. Absent a clear definitive statement that the parties wish to litigate or arbitrate differences over the failure to engage in discussion relating to a renewal, and absent some indication as to how damages are to be fixed in case of a breach, the courts should hesitate before enforcing such a contract provision.

The order below is affirmed insofar as it dismisses without prejudice Necchi's parallel declaratory judgment action and directs Necchi to proceed to arbitration on items 4 and 5 and to appoint an arbitrator for those purposes; in all other respects the order is reversed.

Exhibit G

Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NECCHI S.p.A.,

Plaintiff-Appellant,

v.

NECCHI SEWING MACHINE SALES CORP.,

Defendant-Appellee.

In the Matter of the Arbitration of Controversies,

between

NECCHI SEWING MACHINE SALES CORP.,

Petitioner-Appellee,

and

NECCHI S.p.A.,

Respondent-Appellant.

PETITION FOR REHEARING

Donovan Leisure Newton & Irvine, New York, N. Y., for petitioner.

Petition for rehearing denied.

J. E. L.

L. P. M.

U. S. C. JJ.

Exhibit H

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

NECCHI SEWING MACHINE SALES CORPORATION,
Petitioner,

v.

NECCHI S.p.A.

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 5th, 1966.

/s/ John M. Harlan
Associate Justice of the Supreme Court of the United States

Dated this 19th day
of November, 1965

Exhibit I

New York Civil Practice Law and Rules, §7501

§7501. Effect of arbitration agreement.

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.